

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

TRACY and BARBARA NEIGHBORS;
ARUL MENEZES and LUCRETIA
VANDERWENDE; LAKE SAMMAMISH
4257 LLC; HERBERT and ELYNNE
MOORE; TED and ELAINE DAVIS; REID
and TERESA BROWN; SHAWN and TRINA
HUARTE; ANNETTE MCNABB; EUGENE
and ELIZABETH MOREL; VOLKER ELSTE
and GAIL UREEL,

Plaintiffs,

vs.

KING COUNTY, a home rule charter county,
and THE CITY OF SAMMAMISH, an
Incorporated Municipality

Defendants.

Case No.: 2:15-cv-00970

MOTION FOR TEMPORARY
RESTRAINING ORDER AND
PRELIMINARY INJUNCTION

ORAL ARGUMENT REQUESTED

NOTE ON MOTION CALENDAR:
06/17/2015

COME NOW Plaintiffs Tracy and Barbara Neighbors, Arul Menezes and Lucretia
Vanderwende, Lake Sammamish 4257 LLC, Herbert and Elynne Moore, Ted and Elaine
Davis, Reid and Teresa Brown, Shawn and Trina Huarte, Annette McNabb, Eugene and
Elizabeth Morel, and Volker Elste and Gail Ureel, pursuant to Federal Rule of Civil
Procedure 65, and respectfully request that this Court issue a Temporary Restraining Order

MOTION FOR TEMPORARY RESTRAINING ORDER AND
PRELIMINARY INJUNCTION
PAGE 1

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1 and Preliminary Injunction against Defendants King County and the City of Sammamish,
 2 and in support thereof allege as follows:

3 **I. INTRODUCTION**

4 This matter concerns the land within and adjoining a 12.45 mile length of
 5 abandoned railroad right-of-way in King County, Washington between milepost 7.3, near
 6 Redmond, and milepost 19.75, at Issaquah, along Lake Sammamish. All of the above-
 7 named Plaintiffs currently own property adjoining the former railroad right-of-way, which
 8 has been converted into a nature and hiking trail by King County. Some of the Plaintiffs
 9 have owned their property for over 30 years.¹ The Plaintiffs' request for a Temporary
 10 Restraining Order and Preliminary Injunction is premised upon King County's plans to
 11 illegally widen its existing surface easement for recreational trail use onto property owned
 12 by the Plaintiffs.

14 Defendant King County, pursuant to the National Trails System Act Amendments
 15 of 1983, Pub. L. No. 98-11, § 209 97 Stat. 42, codified at 16 U.S.C. § 1247(d) (2006) (the
 16 "Trails Act"), currently possesses a surface easement for recreational trail use across the
 17 former railroad right-of-way. King County gained its interest in the right-of-way from
 18 Burlington Northern Santa Fe ("BNSF") on or about September 29, 1998, and the trail was
 19 opened in 2006. Since that time, no railway carriers have used the railroad, the tracks have
 20 been removed from the right-of-way, and the land has been used as a recreational trail.
 21 Furthermore, since King County established the trail, Plaintiffs have lived in relative
 22 harmony with King County and local trail users.

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¹ Eugene and Elizabeth Morel's property has been in the Morel family for over 70 years.

1 Now, despite the fact that Plaintiffs, King County, and local trail users have
2 coexisted with one another for nearly 10 years, King County is preparing to execute
3 construction alongside and within the former railroad corridor that will cause irreparable
4 harm to Plaintiffs' property outside the boundaries of the current trail. Such harm includes,
5 among other things, destruction of parking areas, removal of landscaping, loss of privacy,
6 loss of mature trees, and loss of access that has been in place for many years. What is
7 particularly alarming is that King County's planned activities far exceed the boundaries of
8 what it actually possesses. Indeed, as is made clear by the plans King County has submitted
9 for public review, in several areas along the trail King County asserts that it has a right to
10 control an expanse that goes as least 10 feet beyond the boundaries it can be said to legally
11 have control over, and in many other areas well beyond that width.
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13 Plaintiffs' Complaint, filed concurrently with this Motion, seeks judgment against
14 King County declaring that the recreational trail easement was originally acquired by the
15 railroad as a prescriptive easement, and thereby pursuant to Washington law is limited to a
16 width that is necessary for railroad purposes. Plaintiffs' Complaint further includes a
17 request that King County and the City of Sammamish be enjoined from engaging in any
18 activities to widen the trail, lest these government entities choose to institute condemnation
19 proceedings and pay just compensation to the Plaintiffs for a taking of their property.
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21 Because King County's imminent construction has been endorsed and is about to
22 be approved by Defendant, the City of Sammamish ("the City"), Plaintiffs bring this
23 request for a temporary restraining order and preliminary injunction before this Court
24 against both Defendants to prevent interference with Plaintiffs' property interests on the
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1 grounds that King County's plans for construction beyond the recreational trail easement
 2 will cause immediate and irreparable harm to be done to the Sammamish homeowners.

3 **II. FACTS PERTINENT TO THE PLAINTIFFS' REQUEST FOR A**
 4 **TEMPORARY RESTRAINING ORDER AND PRELIMINARY**
 5 **INJUNCTION**

6 **A. King County's Plan to Widen the Trail**

7 The activities the Plaintiffs seek to enjoin concern the imminent execution of King
 8 County's plans to inappropriately widen particular portions of its trail easement as part of
 9 its East Lake Sammamish Master Plan Trail project. (See
 10 <http://www.kingcounty.gov/recreation/parks/about/capitalimprovements/eastlakesammamishtrail.aspx>,
 11 last visited June 16, 2015.) The East Lake Sammamish Master Plan Trail
 12 project (the "Master Plan") is divided between two segments: "Segment A," a 1.2 mile
 13 segment set to begin construction in late spring 2015, and "Segment B," a 3.6 mile segment
 14 which is set to begin construction in late spring 2016. *See id.*

15 Those portions of concern to the Plaintiffs relate to those portions of Segments A
 16 and B of the former railroad corridor in which the original establishing railroad acquired a
 17 prescriptive easement over the surface of the corridor. Attached hereto as Exhibit A is a
 18 portion of a map prepared by King County Department of Natural Resources and Parks,
 19 which indicates the locations of the endpoints of Segments A and B, the locations of the
 20 Plaintiffs' properties,² and the locations of those areas where the establishing railroad
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25 ² Plaintiffs have added features to the King County map in order to clearly depict the locations of the
 Plaintiffs' properties within Segments A and B. The addresses of the Plaintiffs' properties are highlighted
 in yellow, and the locations of Segments A and B are indicated by red and blue arrows.

1 acquired a prescriptive easement in the land.³ As shown by Exhibit A, all of the Plaintiffs
 2 possess property in the areas where the railroad obtained a prescriptive easement. Despite
 3 what is shown by the map, the width of the prescriptive easement occupied and used by
 4 BNSF before the right-of-way was converted to a trail was several feet less than what is
 5 now claimed by King County. See Declaration of Arul Menezes and Lucretia
 6 Vanderwende, attached hereto as Exhibit E, at ¶7; Declaration of Herbert and Elynne
 7 Moore, attached hereto as Exhibit F, at ¶6; Declaration of Reid and Teresa Brown, attached
 8 hereto as Exhibit G, at ¶7; Declaration of Tracy and Barbara Neighbors, attached hereto as
 9 Exhibit I, at ¶4. As explained *infra*, the width of the trail in its current condition is the
 10 maximum width of the surface that King County acquired from BNSF pursuant to the
 11 Trails Act, and so is the maximum width that is under the control of King County for its
 12 trail purposes.

14 For the most part, the East Lake Sammamish Trail in its present form generally
 15 meets with this maximum limitation as it is limited to a maximum width of approximately
 16 12 feet. See *id.* However, the “Master Plan,” as described by King County, goes well
 17 beyond these limits. As stated by King County, the Master Plan “includes the construction
 18 of a 12 foot wide paved trail with 2 foot wide gravel shoulders and a 1 foot clear zone on
 19 either side of the trail.” See Letter from King County re: Encroachments in Trail Corridor,
 20 February 12, 2015, attached hereto as Exhibit B. Thus, King County’s immediate plans
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25 ³ As explained *infra*, in the map King County labels the prescriptive easement areas as “Adverse Possession.”
 Such labeling is misleading, for although the railroad acquired its interest in the land by use, the interest
 obtained is an easement by prescription.

1 call for a widening of the trail that is at least 3 feet and as much as 6 feet beyond the limits
 2 of what it can arguably be said to legally possess.⁴

3 **B. Construction Status**

4 According to King County, construction of Segment A was anticipated to begin late
 5 spring 2015. Although King County has not yet begun construction and widening of the
 6 trail, the Plaintiffs were advised by the letter of February 12, 2015 that they would have to
 7 remove “[a]ll landscaping and other items that interfere with trail construction . . . by May
 8 31, 2015 . . . [and that all] landscaping and other items that conflict with trail construction
 9 and remain within the County right-of-way after May 31, 2015 will be considered
 10 abandoned and **subject to removal, impound, and disposal** by the County or its
 11 contractor.” See Exhibit B (emphasis added). Since the time of the letter, the Plaintiffs
 12 have been led to believe by King County and the City of Sammamish (the “City”) that
 13 construction and widening will take place almost immediately after the City authorizes
 14 King County’s Shoreline Substantial Development Permit (“SSDP”). See e-mail from
 15 Laura Philpot, Assistant City Manager/Public Works Director of City of Sammamish, May
 16 27, 2015, attached hereto as Exhibit C; see also Notice of Public Comment for Shoreline
 17 Substantial Development Permit, release date June 5, 2015, attached hereto as Exhibit D.
 18 According to the Notice of Public Comment, construction may begin as soon as June 18,
 19 2015 – the date when the final public comment period is set to expire. See Exhibit D.
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25 ⁴ In fact, King County’s plans call for removal of what it deems “encroachments” encompassing up to 20
 feet in certain areas. See Declarations of Plaintiffs, Exhibits E-I.

C. **The Irreparable Harm That Will be Done If King County Is Allowed To Execute its Master Plan**

Attached to this motion are Declarations made by several of the Plaintiffs which describe the irreparable harm and damage that will be done to their properties if King County is allowed to begin construction on June 18. *See* Declarations of Arul Menezes and Lucretia Vanderwende, Herbert and Elynne Moore, Ted and Elaine Davis, Reid and Teresa Brown, and Tracy and Barbara Neighbors, attached hereto as Exhibits E-I. In their Declarations, these homeowners provide straightforward examples of the irreparable harm that will be done if the Defendants execute their Master Plan:

1. **Arul Menezes and Lucretia Vanderwende**

Arul Menezes and Lucretia Vanderwende possess property within Segment A and Segment B of the former railroad corridor.⁵ *See* Exhibit E, at ¶¶3, 14. With regard to the property within Segment A, King County's Master Plan calls for the total destruction of all of the mature trees along an embankment between the trail and the house on the property, and for the construction of a 15 foot high wall topped by a 4 foot fence (therefore 2-storays high) at the foot of the embankment, facing the house. *Id.* at ¶5. The planned location of this wall encroaches into their parking area, destroying what is currently parking space for three cars. *Id.* at ¶6. The plan also calls for the complete removal of trees, thereby destroying any privacy for the home. *Id.* The loss of privacy and parking will significantly impact both the quality of life for anyone residing in the home, not to mention these homeowners' property values. *Id.*

⁵ The property at 4257 E Lake Sammamish Shore SE is actually owned by plaintiff, Lake Sammamish 4257 LLC. Arul Menezes and Lucretia Vanderwende are the owners and registered agents of the company, as shown on the Washington Secretary of State's website.

1 King County also plans to place a 70 foot long, 10 foot wide and 20 foot deep
2 concrete drainage vault between the trail and the house. *Id.* at ¶9. This poses a significant
3 impact on these landowners because it forever precludes replanting trees or shrubs for
4 privacy between the house and the trail, ensuring that the damage to these homeowners is
5 permanent and irreparable. *Id.* It would also be prohibitively expensive to remove, should
6 it be proved later that the vault and wall location exceeds King County's prescriptive
7 easement and therefore encroaches on their property. *Id.*

9 King County further plans to route drainage from the north/east side of the trail to
10 this vault, and from there tie into a street drain that runs through the property to the lake.
11 *Id.* at ¶10. This is a minor private street drain that is only 4 inches in diameter for much of
12 the way, and it does not collect existing drainage from the north/east side of the Trail. *Id.*
13 A drain inspector recently advised these homeowners that the drain is nearly 100%
14 clogged, and so if the drain ever overflows the runoff would sheet directly into their garage
15 and lower floor living space. *Id.* at ¶12.

17 Turning to the Plaintiffs' property within Segment B, the homeowners report that a
18 fence was built on the property in 1997 at the edge of the actual area used by the railroad,
19 as measured from the actual rails, before the rails were removed. *Id.* at ¶16. Between the
20 fence and the home is a strip of younger trees and landscaping as well as a private road that
21 gives access to the home and 3 homes further down the road. *Id.* at ¶17. If King County
22 expands the trail towards the house they will destroy the fence, trees, and landscaping and
23 hence any privacy for the home. *Id.* It is also highly likely trail construction will encroach
24 on the street, which is already very narrow. *Id.* Any such encroachment will make it
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impossible for the home on the property and the next 3 homes to be reached by ambulance

1 or fire engine. *Id.* at ¶¶18, 19. The resulting safety issues, loss of access, loss of parking,
 2 and loss of privacy will severely damage the homeowners' quality of life and reduce their
 3 property values, and possibly result in loss of life in the case of fire or medical emergency.

4 2. Herbert and Elynne Moore

5 Herbert and Elynne Moore possess property within the prescriptive easement area
 6 of Segment A of the former railroad corridor. *See* Exhibit F, at ¶3; Exhibit A. King
 7 County's Master Plan at the Moores' location calls for the center line of the trail to be
 8 moved 1 to 2 feet towards their home in order to accommodate a drainage ditch on the
 9 opposite side of the trail. *Id.* at ¶4. This will result in the destruction of 7 significant trees
 10 (as defined by the Master Plan), 12 additional trees, several mature rhododendrons, and
 11 ground cover which all lie between their home and the trail. *Id.* at ¶5. These trees are
 12 extremely large, mature, and lie in an area that was never utilized by the railroad before the
 13 corridor was converted into a nature and hiking trail. *Id.* at ¶6. There is no reason why the
 14 trail could not be moved closer to the opposite side of the trail where the drainage ditch
 15 lies, as opposed to towards these homeowners' home. *Id.* at ¶7. If the trees are removed,
 16 this will cause a loss of privacy and noise barrier from trail users. *Id.* at ¶8.

17 An additional concern for these homeowners is that the planned removal of the trees
 18 and bushes, and the plans to widen and pave the trail will increase flooding of the house
 19 on the property due to removal of these natural barriers and the less permeable character
 20 of the paved road. *Id.* at ¶9. King County's construction plans also call for the removal of
 21 their landscape light and irrigation systems, all of which are beyond the width of the
 22 prescriptive easement the former railroad ever used to operate its railroad. *Id.* at ¶10; *see*
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also Ex. A. The resulting safety and flooding issues, costs for removal, noise increase,
 MOTION FOR TEMPORARY RESTRAINING ORDER AND
 PRELIMINARY INJUNCTION
 PAGE 9

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1 crime increase, and loss of privacy are likely to severely damage these homeowners'
2 quality of life and reduce the property value of their home. *See* Exhibit E, at ¶11.

3 3. Reid and Teresa Brown

4 Reid and Teresa Brown's property is located within Segment B of the former
5 railroad corridor. *See* Exhibit G, at ¶3. The property is bisected into a northern and
6 southern portion by the former railroad corridor. *Id.* Reid Brown has lived at this property
7 since 1981. *Id.* at ¶7. In 1981, when the railroad was still in operation, the railroad
8 occupied a corridor of about 12 feet wide and not more than 15 feet wide on the centerline.⁶
9 *Id.* Whether King County's Master Plan and planned expansion will occur within the
10 northern portion or the southern portion of the Reid's property is unknown to them at this
11 time. *Id.* at ¶9. If King County decides to expand into the northern portion of these
12 landowner's property, this will result in the destruction of a staircase which is used to
13 access a parking area and mailbox on the northern portion of the property. *Id.* at ¶10. If
14 King County decides to expand into the southern portion of their property, this will result
15 in the removal of parking for 2 cars, a privacy fence, ornamental plantings, irrigation
16 system, and retaining wall. *Id.* at ¶11.

17 An additional concern for the Browns is the loss of privacy that would result from
18 the removal of their privacy fence. *Id.* at ¶12. The trail is approximately 4 feet higher than
19 their parking area, and looks directly down into their bathroom and bedroom. *Id.* Of note,
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24 ⁶ In their Declaration, the Browns also note that taking King County's expected legal position to its full
25 conclusion, King County claims control of a trail 100 feet wide. As pointed out by the Browns, this is
completely ridiculous, for if such were the case then the Browns would lose 15 feet of their living room,
bathroom, and bedroom, along with all parking and access to their house. Additionally, at least 6 other
legally constructed and currently occupied residences in Segment B have the same issue.

1 is that no additional views are gained by trail users, as the Browns' home completely blocks
2 the view of Lake Sammamish from the viewpoint of the trail. *Id.* In sum, the resulting
3 loss of parking, costs for removal, noise increase, crime increase, and loss of privacy are
4 likely to severely damage the Browns' quality of life and reduce the property value of their
5 home. *Id.* at ¶13.

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7 4. Ted and Elaine Davis

8 Ted and Elaine Davis' property is located within Segment B of the former railroad
9 corridor. *See* Exhibit H, at ¶3. King County's Master Plan calls for the removal of these
10 homeowners' privacy fence, removal of their landscaping and irrigation system, and
11 seizure of their parking area. *Id.* at ¶5. King County's plans will also have the effect of
12 narrowing the road utilized for access to their home and 12 other homes, and so they will
13 not have any access for the fire department, and the accessibility for other emergency
14 personnel, such as EMT's, will be greatly reduced. *Id.* at ¶6. As seniors, this is a major
15 concern to the Davises. *Id.*

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17 Based upon their review of the Master Plan, the Davises believe that if the center
18 line of the Trail must be moved, there is no reason why it cannot be moved towards the
19 northern portion of their property, which is unimproved, as opposed to the southern portion
20 where their home is located. *Id.* at ¶7. An additional concern is that the planned removal
21 of trees and bushes, and the plans to widen and pave the trail will increase flooding of their
22 home and property due to removal of these natural barriers and the less permeable character
23 of the paved road. *Id.* at ¶8.

24
25 King County's construction plans also call for the removal of these homeowners'
landscape light and irrigation systems, all of which are beyond the width of the prescriptive

1 easement the former railroad ever used to operate its railroad. *Id.* at ¶9. The resulting loss
 2 of parking, safety and flooding issues, costs for removal, noise increase, crime increase,
 3 and loss of privacy will severely damage their quality of life and reduce the property value
 4 of their property and home. *Id.* at ¶10.

5 The Davises note further that any of the supposed “improvements” to the trail by
 6 King County do not appear necessary for bicyclists, who the Davises have observed to
 7 prefer the biking lanes located on nearby East Lake Sammamish Parkway. *Id.* at ¶11.

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 9 5. Tracy and Barbara Neighbors

10 Tracy and Barbara Neighbors’ property is located within Segment B of the former
 11 railroad corridor. *See* Exhibit I, at ¶3. The property is bisected into a western and eastern
 12 portion by the former railroad corridor. *Id.* The western portion of their property has on it
 13 a small lakefront “cabana” which they utilize for entertainment and as a guest residence.
 14 *Id.* at ¶6. Their main residence sits atop a steep hillside and is accessible via a concrete
 15 footpath which descends to a concrete path near the edge of the existing trail. *Id.* at ¶7.
 16 The Neighbors use this concrete path to wheel heavy items up and down the footpath, such
 17 as lawnmowers and waste containers. *Id.* The edge of the concrete path lies outside of the
 18 eastern side of the current 12 foot wide trail. *Id.* at ¶8.

20 Outside of the western side of the 12 foot wide trail there is a row of mature
 21 landscaping bushes which provides privacy for the guest residence on the western portion
 22 of these homeowners’ property. *Id.* at ¶9. According to King County officials, King
 23 County proposes to expand the trail at the Neighbors’ location to a width of 22 feet, and
 24 further plan to pave the trail and also to construct a retaining wall on the eastern side of the
 25 trail. *Id.* at ¶10. In addition, the Neighbors have been advised by King County that it would

1 like to convert their concrete path into a flight of stairs, to remove at least the 3 mature
2 trees on the main residence side of their property, and remove or substantially modify their
3 irrigation system. *Id.* at ¶¶10, 11.

4 If these changes are made, it would result in the loss of these homeowners'
5 irrigation system, loss of their landscaping bushes, destruction of their concrete pad, and
6 partial removal of their concrete path. *Id.* at ¶12. Aside from the obvious loss of property,
7 King County's proposed changes would result in a loss of privacy due to the removal of
8 the landscaping and expansion of the trail nearer to the Neighbors' main residence and
9 cabana. *Id.* at ¶13. Likewise, the increase in foot and bicycle traffic will cause a further
10 reduction of privacy. *Id.* The conversion of the concrete path would change the complete
11 nature of the access to the lake front property, and would have the effect of placing a
12 tremendous burden on these homeowners if they are forced to haul their equipment up
13 concrete steps rather than a smooth path. *Id.* at ¶14.

14
15 Another effect of implementation of the Master Plan would be reduction in the
16 Neighbors' ability to fully enjoy the southern portion of their property. *Id.* at ¶15. Once
17 the trail is paved there will certainly be a significant uptick in usage of the property. *Id.*
18 The net result will have a chilling effect on their ability to freely access their property
19 without interference by trail users. *Id.*

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21 There is also the potential loss of water, sewer and electrical connection leading to
22 the lakefront cabana. *Id.* at ¶16. Previously approved water, sewer and electrical
23 connections run underneath the trail to the lake front "cabana." *Id.* King County has been
24 notified by the Neighbors of the need to maintain these utility connections as well as the
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1 ability to access the utilities from time to time as might be required. *Id.* The cabana was
 2 permitted in 2008 and the connections put in place around that time. *Id.*

3 Another concern for the Neighbors is water runoff. *Id.* at ¶17. The Neighbors
 4 currently do not experience water runoff issues due to the permeable nature of the trail in
 5 its present design despite the runoff from the adjacent hillside. *Id.* Pavement of the trail
 6 will create new water runoff issues due to the introduction of an asphalt surface. *Id.* Put
 7 simply, the rainwater will have to go somewhere. King County has yet to provide
 8 clarification as to how they expect to deal with this issue on these homeowners' property.
 9 *Id.* If King County decides to construct a storm water retention vault, this would be an
 10 additional loss of these homeowners use and enjoyment of the property, not to mention the
 11 introduction of an unsightly wall. *Id.* at ¶18.

13 **III. ARGUMENT**

14 A party seeking a Temporary Restraining Order under Federal Rule of Civil
 15 Procedure 65 “must establish that he is likely to succeed on the merits, that he is likely to
 16 suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips
 17 in his favor, and that an injunction is in the public interest.” *Winter v. Natural Res. Def.*
 18 *Council, Inc.*, 555 U.S. 7, 20 (2008) (discussing standard for preliminary injunction);
 19 *Frontline Medical Associates, Inc. v. Coventry Healthcare Workers Compensation, Inc.*,
 20 620 F. Supp. 2d 1109, 1110 (C.D. Cal. 2009) (requirements for issuing temporary
 21 restraining order are identical to those for preliminary injunction); *L.A. Unified Sch. Dist.*
 22 *v. U.S. Dist. Ct.*, 650 F.2d 1004,1008 (9th Cir. 1981) (“if the district court’s order meets
 23 the exacting requirements of a preliminary injunction, it follows a fortiori that it is
 24 acceptable as a TRO.”).

Alternatively, “serious questions going to the merits’ and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test are met.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132 (9th Cir. 2011). A “serious question” is one on which the movant “has a fair chance of success on the merits.” *Sierra On-Line, Inc. v. Phoenix Software, Inc.*, 739 F.2d 1415, 1421 (9th Cir. 1984).

A. The Plaintiffs are Likely to Succeed on the Merits of Their Claim

The Plaintiffs’ goal in these proceedings is to either permanently enjoin King County from interfering with their property or, if King County and the City so choose, for Plaintiffs to seek just compensation from the Defendants for a taking of their private property. Part and parcel to this goal is declaratory relief in the form of a judgment that determines the expanse of King County’s interest in the right-of-way, i.e. the width of its surface easement. Accordingly, the pertinent issue for the Court’s determination is whether a likelihood of success on the merits exists as to whether King County’s surface easement can be no greater than a width that is necessary for railroad purposes.

Attached as Exhibit J is a portion of a map prepared and made available to the public by King County Department of Natural Resources and Parks. The map depicts the locations of the former railroad right-of-way that comprises the East Lake Sammamish Trail.⁷ *See id.* In its map, King County labels the prescriptive easement it acquired from BNSF as obtained by BNSF’s predecessor-in-interest as “Adverse Possession,” but this is misleading. *See id.* King County’s labeling of these areas is properly interpreted as the

⁷ Exhibit J is identical to Exhibit A, save for the deletion of the features drawn on Exhibit A by Plaintiffs.

1 **means** by which BNSF's predecessor-in-interest acquired its interest in the land. The same
 2 error is made in other instances in Exhibit J in which certain areas are labeled as
 3 "Easement" or "Deed to Railroad from Private Party." *See id.* What King County
 4 apparently meant to communicate is that the "Easement" areas relate to portions where
 5 BNSF's predecessor-in-interest conveyed an easement by deed, and that the "Deed to
 6 Railroad from Private Party" areas relate to portions where BNSF's predecessor-in-interest
 7 conveyed the fee interest by deed. This makes sense of course, since an easement can of
 8 course be granted by deed. *See Kiely v. Graves*, 271 P.3d 226, 231 (Wash. 2012)
 9 (explaining that a deed to a local government for a right of way could be interpreted as only
 10 conveying an easement).

12 Such is the same for the "Adverse Possession" areas. King County means to
 13 communicate the manner by which BNSF's predecessor-in-interest acquired a prescriptive
 14 easement in those areas. In these areas, the railroad did not obtain a deed from the
 15 landowners, it simply began using the land for railroad purposes. A prescriptive easement
 16 requires "(1) use **adverse** to the owner of the servient land; (2) use that is open, notorious,
 17 continuous, and uninterrupted for 10 years; and (3) knowledge of such use by the owner at
 18 a time when he was able to assert and enforce his rights." *810 Props. v. Jump*, 170 P.3d
 19 1209, 1261 (Wash. App. 2007) (emphasis added). In fact, the United States government
 20 stipulated that BNSF's predecessor-in-interest acquired a prescriptive easement in these
 21 areas in a Trails Act takings case in the Court of Federal Claims. *See Beres v. United*
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1 *States*, 104 Fed. Cl. 408, 415 (Fed. Cl. 2012).⁸ Exhibit J conclusively shows that the
 2 easement obtained by BNSF's predecessor-in-interest was not obtained via a specific grant
 3 that defined the precise boundaries of the easement.

4 In Washington, the extent of an easement acquired by prescription is "fixed and
 5 determined by the user in which it originated." *Northwest Cities Gas Co. v. Western Fuel*
 6 *Co.*, 123 P.2d 771, 779 (Wash. 1942) (*quoting* 28 C.J.S. 751, Easements, § 74). Similarly,
 7 a right of way by prescription is bounded by the line of reasonable enjoyment. *Van De*
 8 *Vanter v. Flaherty*, 79 P. 794, 796 (Wash. 1905). Pursuant to the doctrine of reasonable
 9 enjoyment, the width of a prescriptive easement is restricted to that which is reasonably
 10 necessary and convenient to effectuate the original purpose of the easement. *Sunnyside*
 11 *Valley Irr. Dist. v. Dickie*, 149 73 P.3d 369, 372 (Wash. 2003).

13 As set forth by several of the Plaintiffs, the current width of the trail was all that
 14 was under the control of BNSF before the railroad easement was converted to an easement
 15 for recreational trail use. *See* Decl. of Menezes and Vanderwende, Exhibit E, at ¶7; Decl.
 16 of Moores, Exhibit F, at ¶6; Decl. of Browns, Exhibit G, at ¶7; Decl. of Neighbors, Exhibit
 17 I, at ¶4. Indeed, Reid Brown states that he owned the property as far back as 1981 when
 18 BNSF was still running its trains over the tracks, and that at that time the width of the
 19 railroad corridor was the same as the current width of the trail, which was between 12 and
 20 15 feet wide. *See* Exhibit G, at ¶7. Thus, the haphazard boundaries of the prescriptive
 21 easement, as depicted by King County in Exhibit J, are inaccurate because they are not
 22
 23

24
 25 ⁸ In a prior decision, Judge Marian Blank Horn held that abutting homeowners to this same railroad right-
 of-way owned fee title to the land underlying the right-of-way. *Beres v. United States*, 97 Fed. Cl. 757
 (Fed. Cl. 2011).

1 restricted to that which was used by BNSF to operate its railroad. Such is made obvious
 2 by the fact that the boundary lines drawn by King County invade into some of the Plaintiffs'
 3 houses. As pointed out by the Reids, King County's boundary lines go to a width of a 100
 4 feet, which would result in trail users hiking and cycling through his living room, bathroom,
 5 and bedroom. *See* Exhibit G, at ¶14.

6 That the width of a railroad's prescriptive easement is defined by its use is
 7 supported by the Court of Federal Claims' decision in *Illig v. United States*, 58 Fed. Cl.
 8 619 (Fed. Cl. 2003). In *Illig*, the parties were in dispute over the width of a railroad
 9 easement that was converted into a recreational trail under the Trails Act. *See id.* For the
 10 portion of the railroad easement the original establishing railroad acquired an easement by
 11 prescription, the court determined the width could only be established by evidence showing
 12 what width the railroad actually used. *Id.* at 630. The holding in *Illig* therefore supports
 13 the Sammamish homeowners argument that the width of King County's easement can be
 14 no greater than the current width of the trail because that is all that is necessary for railroad
 15 purposes.
 16
 17

18 For these reasons, the Plaintiffs have conclusively proven that they are likely to
 19 succeed on the merits of their claims, which is dependent on a determination that King
 20 County's easement is of no greater width than what is necessary for railroad purposes.

21 **B. Absent Immediate Injunctive Relief, the Sammamish Homeowners Will**
 22 **Likely Suffer Irreparable Harm**

23 In their Declarations, the Plaintiffs have set forth a legion of examples of the harm
 24 that will be done on their properties if King County is permitted to execute its Master Plan.
 25 *See* Exhibits E-I. Destruction of property along the trail, including removal of landscaping,

1 retaining walls, and cutting down large mature trees are some of the more poignant
2 examples of the severe harm that will be done, given the huge expenses that would be
3 incurred by homeowners to remove those objects. *See* Decl. of Moores, Exhibit F, at ¶5
4 (Master Plan for Segment A calls for the destruction of 7 significant, 12 additional trees,
5 several mature rhododendrons, and ground cover which all lie between their home and the
6 trail).

7
8 Perhaps the most prime examples of how the harm is irreparable are set forth by
9 homeowners whose properties will no longer be accessible by emergency vehicles and
10 those whose properties that are set to have large structures placed upon them. In their
11 Declarations, Arul Menezes, Lucretia Vanderwende, Ted Davis, and Elaine Davis point
12 out that when King County narrows their access roads, emergency vehicles will no longer
13 have adequate access to their houses. *See* Exhibit G, at ¶¶18, 19; Exhibit H, at ¶6.

14
15 Arul Menezes and Lucretia Vanderwende also point out that there will be a huge,
16 2-story high wall and fence erected on their property. *See* Decl. of Menezes and
17 Vanderwende, Exhibit E, at ¶5. In addition, a 70 foot long, 10 foot wide and 20 foot deep
18 concrete drainage vault will be built between the trail and the house. *Id.* at ¶9. If Arul
19 Menezes and Lucretia Vanderwende are not granted temporary injunctive relief, yet
20 eventually do succeed on the merits of their claim, King County will be ordered to remove
21 all of these structures. The cost of such endeavors would be huge, and these homeowners
22 will be forced to tolerate the intrusion that construction and deconstruction would cause.

23
24 Nearly as problematic as having enormous structures put in place is the loss of
25 parking. As can be seen in several of the pictures accompanying the Declarations, parking
is in nothing short of high demand in the area. *See* Decl. of Menezes and Vanderwende,

1 Exhibit E; Decl. of Browns, Exhibit G; Decl. of Davises, Exhibit H. The loss of these
2 prized assets would result in a huge decrease in each of these homeowners' property values.

3 In addition, it is irrefutable that irreparable harm is imminent and likely for those
4 homeowners whose properties lie within Segment A. As has been made clear by the City,
5 it will be in position to issue its final authorization of King County's Shoreline Substantial
6 Development Permit as soon as the latest Public Comment expires on June 18, 2015. *See*
7 Exhibit D. If injunctive relief is not granted by that date, then there will no longer be any
8 impediments to King County's execution of its Master Plan for Segment A. This is not to
9 say that irreparable harm is not likely for the homeowners in Segment B, for all of the
10 evidence indicates that King County has substantial plans for the entirety of the 12.45 mile
11 East Lake Sammamish Trail. Simply because no specific plans have been released does
12 not mean that the massive construction will not occur. Such has been made clear by City
13 officials who have made known to Segment B homeowners that King County's plans call
14 for massive changes to that area. *See* Decl. of Neighbors, Exhibit I, at ¶10. In any event,
15 King County unequivocally states on the website it maintains for the trail that
16 "[c]onstruction is anticipated to begin late spring 2016." (*See*
17 [http://www.kingcounty.gov/recreation/parks/about/capitalimprovements/eastlakesamma](http://www.kingcounty.gov/recreation/parks/about/capitalimprovements/eastlakesammamishtrail/eastlakesammamishtrailsegmentbplanning.aspx)
18 [mishtail/eastlakesammamishtrailsegmentbplanning.aspx](http://www.kingcounty.gov/recreation/parks/about/capitalimprovements/eastlakesammamishtrail/eastlakesammamishtrailsegmentbplanning.aspx), last visited June 16, 2015.)

19
20
21 In sum, to characterize the anticipated harm that will be done on these landowners
22 as imminent, likely, and irreparable would be a vast understatement, given that the Master
23 Plan calls for massive changes to these landowners' properties. For this reason, and for
24 the reasons set forth in the attached Declarations, this Court should enter an Order enjoining
25

1 King County and the City from moving forward with the construction described by King
 2 County's Master Plan.

3 **C. The Balance of Equities Tips Decisively in Favor of Issuance of the TRO**

4 The equities here favor the Plaintiffs for they stand to suffer severe harm to their
 5 property if the TRO is not issued. By contrast, Defendants' plans for a new and improved
 6 trail for the public will merely be put off until such time as a court of competent jurisdiction
 7 can resolve the underlying title dispute. It cannot be said that King County residents will
 8 suffer any immediate harm due to such a delay, as the trail has been in the precise condition
 9 it is now for nearly 20 years. Thus, the Plaintiffs' request is merely a request that King
 10 County maintain the status quo. Given that any hardship King County could be said to
 11 suffer would pale in comparison to that which would be endured by the Plaintiffs, the
 12 balance of equities tips decisively in favor of issuing the TRO.

13
 14 **D. The Public's Interest is Squarely in Favor of Protecting the Plaintiffs from**
 15 **Harm**

16 The conflicting public interests involved here concern the anticipated acts of King
 17 County, a government entity, which these homeowners contend will certainly damage their
 18 private property. Article I, Section 16 of the Washington Constitution provides that "[n]o
 19 private property shall be taken or damaged for public or private use without just
 20 compensation having been first made." Thus, the public interest implicated here is the
 21 threat of a governmental taking without just compensation. Indeed, King County's
 22 proposed actions establish the elements for a claim of inverse condemnation. *See*
 23 *Dickgieser v. State*, 105 P.3d 26, 29 (Wash. 2005) (identifying the elements required to
 24 establish an inverse condemnation claim as: "(1) a taking or damaging (2) of private
 25

property (3) for public use (4) without just compensation being paid (5) by a governmental entity that has not instituted formal proceedings.”). If King County wishes to widen its trail, the proper course of action would be for King County and/or the City to initiate condemnation proceedings. It is no surprise to Plaintiffs that Defendants have chosen to side-step this course, for given the high property values involved, such would be a costly endeavor for the Defendants. Considering that the public’s interest is always served when a government abides by its laws, the public interest in this instance is in favor of the Plaintiffs.

E. Even If the Defendant Characterizes Plaintiffs’ Chances Of Success on the Merits as Unlikely, Because the Hardship Balance Tips Sharply Towards Plaintiffs Injunctive Relief Should be Granted

In those instances where there may be serious questions going to the merits of a claim, yet the balance of hardships tips sharply in a plaintiff’s favor, such will support issuance of an injunction if there is a likelihood of irreparable injury and the injunction is in the public interest. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011).

Thus, even if this Court doubts the likelihood of success of Plaintiffs’ claim, because the evidence set forth clearly shows the Plaintiffs will likely endure irreparable injury if King County executes its Master Plan, then pursuant to *Cottrell* injunctive relief may still be issued if such is in the public interest.⁹ As stated previously, public interest is

⁹ Plaintiffs anticipate that King County may point to another action filed by some of these homeowners and point to a recent order from that case as raising “serious questions” going to the merits of these claims. See *Sammamish Homeowners, et al v. King County*, No. 15-CV-0028 MJP, filed February 25, 2015, Order on Motion to Dismiss for Lack of Standing, Dkt. # 19. Any such argument would be a straw-man argument, because the claim for relief in that case is unrelated to the issue here. This case is about the width of the trail easement, and does not touch issues of title. In any event, it is worth noting that decision did not even touch on the merits of those plaintiffs’ claims, as the court granted them permission to refile their case.

1 served in this instance by preserving the Plaintiffs' property and avoiding the damaging of
2 their property without compensation.

3 For these reasons, this Court should issue a TRO even if the Court believes there
4 are serious questions going to the Plaintiffs' claims.

5 **IV. CONCLUSION**

6 For the foregoing reasons, the Plaintiffs respectfully request this Court enter a
7 Temporary Restraining Order and Preliminary Injunction restraining Defendants King
8 County and the City of Sammamish from executing King County's planned construction,
9 pending final judgment of the underlying action in this matter.
10

11 Date: June 17, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of June 2015, I served the foregoing via electronic mail on Defendants King County and the City of Lake Sammamish.

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